

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON KELLICE CARTER,

Defendant-Appellant.

UNPUBLISHED

March 27, 2007

No. 268408

Wayne Circuit Court

LC No. 05-009504-01

Before: Zahra, P.J. and Bandstra and Owens, JJ.

PER CURIAM.

Defendant was charged with carjacking, MCL 750.529a. Following a jury trial, he was convicted of unlawfully driving away an automobile (UDAA), MCL 750.413. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred in instructing the jury on UDAA because it is not a lesser included offense of carjacking. Although defendant did not request the UDAA instruction, he did not object to the prosecutor's request for the instruction. A defendant must object to the jury instructions to preserve an instructional error for review. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003); *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). Because defendant failed to object, the issue is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *Gonzalez, supra*.

A court is only required to instruct on a necessarily included lesser offense if requested and the lesser offense is supported by a rational view of the evidence. The court is not permitted to instruct on cognate lesser offenses. *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002); *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002). A necessarily included lesser offense is "an offense which contains some of the elements of the greater offense, but no additional elements," such that the "greater offense cannot be committed without committing the lesser offense." *People v Norman*, 184 Mich App 255, 259-260; 457 NW2d 136 (1990).

Defendant argues that UDAA is not a lesser included offense of carjacking because the latter crime requires that he take a vehicle, whereas the former requires both that he take the vehicle and drive it away. Defendant contends that carjacking does not require the asportation of

the vehicle, i.e., he can take the vehicle without driving it away. However, defendant relies on case law setting forth the elements of carjacking before its amendment in 2004. Regardless of whether one can take a vehicle without moving it, the carjacking statute, as amended by 2004 PA 128, requires that the defendant act “in the course of committing a larceny of a motor vehicle.” MCL 750.529a(1). A larceny requires both the taking and asportation of the subject property. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). Accordingly, defendant has failed to establish plain error.

Defendant next argues that the evidence was insufficient to sustain the verdict. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant argues that he did not take possession of the car without the victim’s permission because she agreed to let him get into the car to try to start it. However, “[t]here is a distinction between surrendering possession and giving mere custody.” *People v Manning*, 38 Mich App 662, 666; 197 NW2d 152 (1972). A surrender of temporary custody for a limited purpose is not a transfer of legal possession. *Id.* at 666-667. The victim testified that she gave defendant permission to try his hand at starting the car; she did not give him permission to take her car. This testimony supports a finding that the victim surrendered temporary custody of the car rather than actual legal possession, and thus defendant took unlawful possession of the car when he kept it and drove off in it once it started.

Affirmed.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens